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Before the
FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
Washington, D.C. 20554

In re Application of

DIXIE BROADCASTING, INC.

For Renewal of Licenses of
Stations WHOS(AM)/WDRM(FM)
Decatur, Alabama

To: Honorable Arthur I. Steinberg)
Administrative Law Judge)

MM Docket No. 92-207

File Nos. BR-881201XN
BRH-881201XO

DIXIE BROADCASTING, INC.
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. SUMMARY | 4 |
| III. PROPOSED FINDINGS OF FACT | 8 |
| A. The Stations | 8 |
| B. DBI's EEO Program During the License Period | 11 |
| C. DBI's Current EEO Program | 19 |
| D. The Petition to Deny and Bilingual Investigation | 22 |
| 1. The Renewal Applications | 22 |
| 2. The Petition and the Opposition | 22 |
| 3. The July 3, 1989 Letter and DBI's Response | 28 |
| 4. The March 15, 1991 Letter and DBI's Response | 31 |
| 5. The October 7, 1991 Telephone Call and DBI's Response | 41 |
| 6. October 15, 1991 Through Early January 1992 | 45 |
| 7. The January 2, 1992 Letter and DBI's Response | 51 |
| 8. The January 24, 1992 Letter and DBI's Response | 58 |
| 9. Mr. Bramlett's Mindset | 62 |
| E. Evidence Concerning Mr. Bramlett's Character for Truthfulness | 64 |
| 1. Julian D. Butler | 64 |
| 2. Hundley Batts, Sr. | 66 |
| 3. B. Lynn Layton | 68 |

Page

| | | |
|----|------------------------------|----|
| 4. | Frank Allan Harris | 69 |
| 5. | Nat Tate, Sr. | 70 |
| 6 | Dicky Dutton | 71 |

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PROPOSED FINDINGS OF FACT
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Dixie Broadcasting, Inc. ("DBI"), licensee of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama (the "Stations"), by its attorneys, hereby submits its proposed findings of fact and conclusions of law in the above-referenced proceeding.

I. INTRODUCTION

1. On December 1, 1988, DBI filed applications for the renewal of the licenses of the Stations (File Nos. BR-881201XN and BRH-881201XO) (the "Renewal Applications"). On March 1, 1989, a "Petition to Deny" the Renewal Applications was filed by Region V of the NAACP and the National Black Media Coalition (the "Petition"). (MMB Ex. 2.)^{1/} DBI filed an "Opposition to Petition to Deny" (the "Opposition") on April 14, 1989. (MMB Ex.

^{1/} Pages of the record will be cited herein as "Tr. ____"; DBI hearing exhibits will be cited as "DBI Ex. ____, p. ____"; and Mass Media Bureau hearing exhibits will be cited as "MMB Ex. ____, p. ____".

4, pp. 2-34.) Thereafter, between July 1989 and February 1992, the Commission conducted a Bilingual^{2/} investigation into the EEO practices of the Stations, consisting of a series of written and oral inquiries and responses thereto by DBI. On February 3, 1992, DBI and the NAACP filed a Joint Request for Approval of Settlement Agreement ("Joint Request") based upon an agreement entered into between them on January 22, 1992, resolving the allegations in the Petition. (DBI Ex. 5A, pp. 16-23.)

2. By Hearing Designation Order (FCC 92-391) released September 3, 1992 ("HDO"), the Commission granted the Joint Request,^{3/} but, as a result of its Bilingual investigation, designated the Renewal Applications for hearing on the following issues:

(1) To determine whether the licensee of Stations WHOS(AM)/WDRM(FM) made misrepresentations of fact or was lacking in candor and violated Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015, with regard to the station's [sic] EEO program and documents submitted in support thereof (the "Misrepresentation Issue");

(2) To determine the extent to which the licensee of Stations WHOS(AM)/WDRM(FM) complied with the affirmative action provisions specified in Section 73.2080(b) (the "EEO Program Issue");

(3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

^{2/} Bilingual-Bicultural Coalition on the Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual").

^{3/} NBMC was not a party to the settlement agreement or the Joint Request. NBMC was denied standing. (HDO at paragraph 4.)

The burdens of proceeding and proof on these issues were assigned to DBI. (HDO at paragraph 16.)

3. The HDO also provides that if it is determined that DBI has willfully or repeatedly violated Section 73.1015 of the Commission's Rules, but that denial of the Renewal Applications is not warranted under the Misrepresentation Issue, it shall be determined whether a forfeiture in an amount up to \$50,000 (reflecting the \$25,000 statutory maximum for each of the two instances of possible misrepresentation/lack of candor cited in the HDO) should be imposed. (HDO at paragraph 20.) The HDO does not provide for a forfeiture contingency under the EEO Program Issue.

4. A prehearing conference in this proceeding was held on October 21, 1992. On January 8, 1993, DBI filed a Motion for Summary Decision with respect to both issues. The Motion was opposed by the Mass Media Bureau on January 27, 1993, and denied by the Presiding Judge. (Memorandum Opinion and Order, FCC 93M-69, released February 12, 1993.) Hearings were held in Washington, D.C., on February 17, 23, 24, 25 and 26, 1993 and on March 1 and 2, 1993. The record was closed on March 2, 1993. The Presiding Judge specified April 16, 1993, as the deadline for filing proposed findings of fact and conclusions of law. (Order, FCC 93M-89, released March 5, 1993.) This deadline was extended to April 30, 1993. (Order, FCC 93M-170, released April 20, 1993.)

II. SUMMARY

5. The focus of the inquiry under the Misrepresentation Issue is whether or not DBI, through J. Mack Bramlett, its Vice President, director, 10% stockholder and the Stations' General Manager (1) misstated or concealed facts in filings with the FCC, (2) with an intent to deceive the FCC. The record is quite clear that there were misstatements made by DBI in certain of its FCC filings. These misstatements include the number of hires during the period 1982 through February 1989 (the "License Period") and DBI's explanation for this inaccuracy. The record is equally clear, however, that these misstatements were not the product of intentional deception. Rather, they resulted from a good faith misunderstanding of and miscommunication between Mr. Bramlett and

protected by counsel. He responded promptly at all times to his counsel's inquiries and instructions, fully and to the best of his ability. In responding to these queries, however, he did not refer back to previous DBI filings to make sure the responses fit together and were consistent. He expected counsel to do that. He did carefully review the facts he had provided for each response to make sure they were accurate. In hindsight, he realizes he should have reviewed more carefully the entire statements prepared for his signature. As a bottom line, however, he never knowingly provided inaccurate information or concealed information from the FCC. (DBI Ex. 1, pp. 31-32; Tr. 464.)

7. Each misstatement made by DBI in the course of the FCC inquiry reflected the same modus operandi between attorney and client. Each FCC letter received by DBI, save one, was preceded by a telephonic inquiry to Susan A. Marshall, DBI's counsel, from Hope Cooper, a staff person in the FCC's EEO Branch. Before Mr. Bramlett received a copy of the FCC letter, Ms. Marshall advised Mr. Bramlett by telephone as to the nature of the FCC request and asked Mr. Bramlett questions designed to elicit information to respond to the FCC query. Mr. Bramlett responded promptly, in good faith and to the best of his ability. Mr. Bramlett received copies of the FCC letters after having received Ms. Marshall's marching orders. He glanced at the letters but did not read them carefully because he had already discussed them in detail with counsel whom he believed had read them carefully. (Tr. 457-458, 610-612.)

8. Each written response filed by DBI was drafted by Arent Fox. The factual content of the responses consisted of information provided by Mr. Bramlett and information derived by Ms. Marshall from DBI's files. On several occasions DBI's responses included factual representations attested to by Mr. Bramlett under penalty of perjury. In each case, consistent with Mr. Bramlett's understanding of his charge, he scanned the response to locate the specific information he had provided and only reviewed that portion of the response carefully. (Tr. 605-610, 650-652.)

9. There were shortcomings on both sides. Arent Fox could have asked more specific questions and gone over the responses in more detail with Mr. Bramlett. Mr. Bramlett could have read the FCC letters carefully himself and more fully reviewed DBI's responses thereto. As a result of these shortcomings, Mr. Bramlett and Ms. Marshall were on different wavelengths until after the HDO was released. The misstatements which are the subject of this proceeding resulted from their failure to communicate, not from an intent to deceive.

10. The resolution of the Misrepresentation Issue therefore hinges upon the question whether DBI's admitted carelessness in responding to FCC inquiries was so egregious as to be tantamount to intentional deception. DBI strongly believes that its conduct did not rise to that level. In order to prevail on this point, however, DBI believes that it would be necessary to press its case at least through two stages of appeal, even if it prevailed

at the initial decision level. Based upon the time and resources that would be devoted to the appeals, and given DBI's primary goal -- to retain the Stations to which Mack Bramlett has devoted his life -- DBI has agreed with the Mass Media Bureau that the Misrepresentation Issue should be resolved against DBI but that, as contemplated in paragraph 20 of the HDO, the resulting sanction should not be disqualifying.

11. With respect to the EEO Program Issue, DBI does not dispute that it failed to comply with all of the procedures set forth in Section 73.2080(b) of the Commission's Rules. The record reflects that DBI did not engage in consistent recruitment efforts or maintain adequate records to permit a meaningful self-assessment of its EEO program. DBI did, however, adhere to the spirit and purpose of the EEO rule; it affirmatively attempted to recruit and hire qualified minorities and its hiring results substantially exceeded the Commission's 50% of parity guidelines. Nonetheless, for the purpose of bringing this proceeding to a close, DBI acknowledges that some sanction would be appropriate.

12. Thus, for the reasons set forth above, DBI recommends, consistent with its agreement with the Mass Media Bureau, that its Renewal Applications be granted, albeit on a short-term basis and subject to reporting conditions, and that a forfeiture be imposed in the amount of \$50,000.

II. PROPOSED FINDINGS OF FACT

A. The Stations.

13. The Stations are a family-run business. The Stations have a clean record over 20 some years. There have been no violations of the FCC's rules or policies. (DBI Ex. 1, p. 1; Tr. 817.)

14. Mr. Bramlett has worked at the Stations full time since 1962, when he took his first job out of school as the Stations' Chief Engineer. Since 1976, Mr. Bramlett has been the full time General Manager of the Stations, and Vice President, director and 10% voting stockholder of DBI.^{4/} As such, Mr. Bramlett has had supervisory responsibility over all facets of the Stations' day-to-day operations, including hiring and firing, programming, engineering, sales and compliance with FCC rules and regulations, including those pertaining to EEO. During the period 1982 to February 1989 (the "License Period"), Mr. Bramlett oversaw the operation of the Stations himself; there were no separate department heads, other than a sales manager and nighttime program manager, Nat Tate, Sr., in 1982 and 1983, and a national sales manager, Mark Goodwin, starting in the fall of 1986. Mr. Bramlett devoted most of his waking hours to this task and rarely took vacations. (DBI Ex. 1, p. 1; Ex. 3, pp. 26, 32-33.)

^{4/} There is pending with the Commission an application for transfer of control of the Stations which, if approved, would ultimately result in Mr. Bramlett becoming a 50% voting stockholder of the licensee of the Stations. (HDO at paragraph 1, note 1.)

15. Mr. Bramlett graduated from high school and went on to technical school, receiving a certificate in electronics in 1961. He has held a first class operator's license from the FCC since 1961. (Tr. 296.) While Mr. Bramlett has worked continuously at the Stations since 1962, he has held other broadcast and non-broadcast positions and participated in business ventures during this period. In the early 1960's, Mr. Bramlett provided maintenance and emergency services to other broadcast facilities on a contract basis. In the mid-1970's Mr. Bramlett was the station manager of WYUR(TV) in Huntsville, Alabama. Mr. Bramlett formed his own engineering and electronics company for a few years in the mid-1980's and participated as a passive investor in a mining venture. For two to three years in the late 1970's Mr. Bramlett had an interest in a local bank and held the title chairman of the board. He was not a banker or a decisionmaker.

helping her husband as requested. (DBI Ex. 1, pp. 1-2; DBI Ex. 3, pp. 5-8; Tr. 497-499.) Mr. Bramlett's son, Timothy, also worked at the Stations as a full time announcer from August 1986 through August 1989 and his son, Jim, has worked at the Stations since 1988. Other Bramlett children, and a daughter-in-law, have worked at the Stations as well. (DBI Ex. 1, p. 2.)

17. Beginning sometime in 1984 or 1985, the Stations' communications lawyer was Daniel F. Van Horn of the law firm of Arent Fox Kintner Plotkin & Kahn ("Arent Fox"). Mr. Van Horn commenced employment with Arent Fox as an associate in 1979 and became a partner on January 1, 1986. He practiced communications law and dealt with EEO matters throughout his tenure at Arent Fox, and worked for non-communications areas as well. Mr. Van Horn left Arent Fox in April 1992 and has been an Assistant United States Attorney for the District of Columbia since May 11, 1992. (DBI Ex. 4, pp. 3-6, 8-9.) Susan A. Marshall, a senior attorney at Arent Fox, also worked on DBI matters under Mr. Van Horn's supervision, primarily with respect to the Bilingual inquiry and the preparation of the Opposition, commencing in early 1989. The Opposition was one of the first responses to a petition to deny a broadcast license that Ms. Marshall worked on, although she worked on similar pleadings for other clients at around the same time. Ms. Marshall became associated with Arent Fox in 1978. She practices communications law and deals with EEO matters involving broadcast clients. (DBI Ex. 2, p. 1; Tr. 132-133.)

B. DBI's EEO Program During the License Period.

18. The Stations are licensed to Decatur, Alabama, which is located in Morgan County and is not a part of any Metropolitan Statistical Area ("MSA").^{5/} The relevant work force in evaluating the Stations' employment profile during the License Period is therefore Morgan County. According to 1980 United States Census data, the civilian labor force in Morgan County was 39.8% female and 7.4% Black, with other racial minorities represented in statistically insignificant numbers. (DBI Ex. 1, p. 6; DBI Ex. 4, p. 10.)

19. DBI hired 140 individuals to work at the Stations during the License Period. Eighty-three of these hires were considered by DBI to be "employees" for FCC purposes. (MMB Ex. 11, p. 2, 5-6.) DBI did not consider the remaining 57 people to be employees. They included (a) 21 individuals hired on a permanent basis who were asked to leave their employment after a 60 to 90 day probationary period because they were found to be unqualified for the positions for which they were hired, and (b) 36 individuals hired as independent contractors on a purely temporary or "fill-in" basis who were not hired to work on a permanent basis.

^{5/} In 1988, a new MSA was created by Congress consisting of Morgan County and part of adjacent Lawrence County. This MSA was not created by the U.S. Census Bureau, however, and is therefore not reflected in U.S. Census data. Because the FCC relies on the U.S. Census as the source of its labor force data, DBI also relied on U.S. Census data and thus utilized Morgan County as its frame of reference for local civilian work force data. (DBI Ex. 4, p. 10.)

(Id. at pp. 3, 8-9.) The FCC held that the 21 probationary employees should be deemed employees for FCC purposes, so that there were 104 employees hired by DBI during the License Period. (HDO at paragraph 12, note 10.)

20. Nine of the 140 (6.43%) individuals hired by DBI during the License Period were Black.^{6/} Eight of the 104 (7.69%)

"employee" hires were Black.^{7/} (MMB Ex. 12. pp. 1-2.) All

21. Mr. Bramlett was responsible for establishing and implementing the Stations' EEO Program during the License Period. (Tr. 325.) The Stations' EEO policy was informal; it was implemented by Mr. Bramlett so there were no formal procedures for others to follow. (Tr. 412.) During the License Period, Mr. Bramlett did not have a sophisticated understanding of what EEO/

Stations, mostly sales related, for the period 1986 to 1988. As a rule, job applications were kept for six to 12 months and then discarded and, with a few exceptions, no written record was maintained as to the race of job applicants. (DBI Ex. 1, p. 3; Tr. 345, 388-389, 412.)

23. In the early part of the License Period, from 1982 to the beginning of 1986, WDRM(FM) (the "FM Station") had a small coverage area serving a population of approximately 90,000 in Decatur and Morgan County. It was not a desirable place to work, especially for experienced radio people, because DBI wasn't making any money and thus the wages were low. Decatur and Huntsville, a larger municipality approximately 25 miles away, were two different markets. The going hourly rate for employees at radio stations was approximately \$3.25 in Decatur and approximately \$4.00 in Huntsville. (Id.)

24. From September 1982 to September 1983, the FM Station operated with an urban format and the AM Station with a country format; in September 1983 the FM Station switched to a country format and the AM station to a gospel format. (Tr. 327, 358-361.) During the period 1982 to 1986, most job openings for on-air positions at the Stations presented a crisis situation. Openings needed to be filled immediately because DBI was unable to maintain a staff large enough to fill vacancies while a search

group of people who regularly contacted the Stations to ascertain whether there were any job openings or Mr. Bramlett would just grab someone off the street. (Tr. 335-337.) In either case, due to the nature of the Stations, and the minimal wages DBI could afford to pay, the replacement was usually inexperienced in radio or announcing; someone who just wanted to try it out. Such a situation sometimes resulted in the replacement leaving on his own accord in short order when it became apparent that person was unable to do the job. Many of these replacements were hired on a temporary fill-in basis. (DBI Ex. 1, pp. 3-4.) In fact, from the period 1982 through the end of 1985, 23 of the "fill-in" hires were for announcer positions and 7 of the "probationary" hires were for announcer positions. (MMB Ex. 12, pp. 5-6.) On occasion in the early part of the License Period newspaper advertisements were run announcing job openings, but this was the exception rather than the rule. (DBI Ex. 1, p. 4.)

25. During this period, recruitment of salespersons and other staff persons, other than announcers, was mostly accomplished through networking and referrals from station personnel, although newspaper advertisements and other notices were used as well. Due to the number of job applicants available through the networking process, Mr. Bramlett could have hired employees solely out of this applicant pool. Nonetheless, in those non-emergency situations where he was given sufficient notice by departing employees, he solicited job applicants from other recruitment sources, such as Calhoun College, in order to ful-

fill what he understood his EEO obligation to be. In fact, Carla
Snell, a Black female, was referred by Calhoun College and hired

antenna height) and a relocation of its transmitter site closer to Huntsville in January 1986. As a result of these changes, the FM Station's signal covered three counties and approximately 350,000 people and became better known and a more desirable place to work. As a result of the FM Station's expanded coverage area and new-found appeal, job advertisements were placed in Huntsville newspapers more often, including a local Black publication, job announcements were sent to A&M, a Black college, and better results, as evidenced by increased minority applicants and better quality minority applicants, were obtained. Prior to this time, recruitment efforts during the License Period had not as a rule extended to Huntsville because it was a different market, the Stations were not well known there and Huntsville residents were unlikely to work in Decatur. (DBI Ex. 1, pp. 5-6; Tr. 378, 384, 389-394.)

28. Another by-product of the Stations' enhanced image was better pay, with a resultant decrease in job turnover and an improvement in the quality and dedication of the staff. Because existing staff or on-call fill-in workers were increasingly available to fill vacancies on a temporary basis, the Stations were better able to keep vacancies open over a longer period of time while a less hurried search was undertaken for qualified applicants -- there was time to utilize a "hiring window." (DBI Ex. 1, p. 6.) From 1986 through the end of the License Period there were virtually no minority "walk-in" or "networking" appli-

cants; minority applicants were obtained as a result of the Stations' recruitment efforts. (Tr. 385.)

29. Mr. Bramlett evaluated the effectiveness of the Stations' EEO program on an ongoing informal basis throughout the License Period. He judged the effectiveness of his EEO efforts by whether or not minority applicants were produced. Mr. Bramlett believed the Stations' EEO program was very effective because of its results: DBI hired a number of Blacks in a community where, to his knowledge, few, if any, Blacks were ever hired by non-minority stations. (Id.; DBI Ex. 4, pp. 15-16, 25-31; Tr. 347-351, 365-366, 385.)

30. During the License Period, Mr. Bramlett read the trade press and maybe an Arent Fox memo or two regarding EEO obligations. He found counsel's instructions too complicated to follow. He did not ask communications counsel, the NAB or the Alabama Broadcasters Association how to implement a more formal EEO program, nor did he attend any EEO seminars. On or about the time of the filing of the Renewal Applications, however, Mr. Bramlett did briefly discuss with Mr. Van Horn in general terms the need to implement a more formalized program. As a result of his conversation with Mr. Van Horn, in January 1989 Mr. Bramlett ordered from the National Association of Broadcasters its Legal Guide and certain EEO materials. Mr. Bramlett does not remember whether the formal program was implemented before or after the Petition was filed. (Id. at pp. 6-7; Tr. 410-411.)

31. Except for 1982, the Annual Employment Reports during the License Period were prepared in draft form by Mrs. Bramlett and reviewed by Mr. Bramlett. In preparing the drafts, Mrs. Bramlett would review the payroll records for the two-week period covered by the report in question, prepare a list of employees during that period, categorize those employees as best she could in accordance with the Annual Employment Report's instructions and then show the draft report to her husband. In the earlier part of the License Period, the reports were then typed up, signed and mailed to the Commission. After Arent Fox began representing DBI, the executed reports were usually sent to Mr.

Van Horn for his review before they were filed. (Ex. 10, p. 7.)

specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin, age or sex. (DBI Ex. 5A, pp. 1, 5.)

33. In order to implement the Stations' EEO program and to facilitate periodic evaluation of the program's effectiveness, DBI established the following procedures and designated two of its employees -- Mark Goodwin (national sales manager) and James K. Bramlett (assistant EEO officer) -- to carry them out, subject to the ultimate supervision of the Stations' general manager, J. Mack Bramlett (id. at p. 1.):

(a) An "EEO Policy Statement" and a "Notice to Employees and Applicants for Employment Regarding Station WDRM's EEO Policy and Program" are posted in a conspicuous location at the Stations. These notices are modeled after the sample notice in the NAB Handbook. (Id. at pp. 1, 5.)

(b) Job applicants are asked to complete an employment application, the form of which was provided by the NAB. The form contains the requisite notice that DBI is an equal opportunity employer. (Id. at pp. 1, 7.)

(c) The Stations periodically send out notices to potential recruitment sources asking whether they will refer applicants when notified of job openings, and enclosing a self-addressed, stamped postcard for such sources to return acknowledging receipt of the letter. The letter and postcard are modeled after the sample forms in the NAB Handbook. (Id. at pp. 2, 9-10.)

(d) For each hiring opportunity, notices are sent out to approximately 20 recruitment sources and advertisements are placed in local newspapers of general and minority and female circulation. The notices and advertisement requests are modeled after the sample forms in the NAB Handbook. Copies of all letters to recruitment sources and notes of telephone contacts and meetings held with recruitment sources are retained, as are copies of all advertisements and postings of the position. Information about any other recruitment

efforts undertaken is also noted. (Id. at pp. 2, 11-12.)

(e) When resumes or job applications are received relative to each position, they are placed in the file maintained for the pertinent position. An "Applicant Flow Chart" is completed for each job opening. The Applicant Flow Chart is modeled after the sample form in the NAB Handbook. The front of the Applicant Flow Chart summarizes the results of the Stations' recruitment for each position. It asks for the name of each person applying for an opening and the disposition of each person's application. (Id. at pp. 2-3, 13.)

(f) Pertinent information with respect to each applicant is provided on an EEO Data Form, modeled after the form in the NAB Handbook. The information gathered is kept separate from the applicant files while the applicant remains under active consideration for any position. The applicant is informed that the information is required for FCC reporting purposes and will not be used for any other purpose. For those applicants who walk into the Stations, the race and sex is determined from visual observation. For those who apply by mail for advertised positions, the Stations send letters to the applicants acknowledging receipt of the application and asking them to complete and return the EEO Data Form to the Stations. (Id. at pp. 3, 14-15.)

(g) Documentation is kept on the responses received directly from each referral source, whether in the form of correspondence or notes from meetings with or telephone calls to the sources. (Id. at p. 3.)

(h) The effectiveness of each source is periodically evaluated based upon the foregoing records and adjustments are made as necessary. (Id.)

(i) Files relative to all hiring opportunities and other EEO efforts during the license term will be retained until FCC action on the next renewal application filed becomes final. (Id.)

34. Finally, DBI entered into a letter agreement dated January 22, 1992, with Region V of the NAACP, in settlement of the Petition. This agreement has been approved by the FCC but its terms are not yet effective. Nonetheless, the Stations have

been abiding by the operating provisions set forth in paragraphs 1.1 through 1.4 thereof, including contacting the Decatur Branch of the NAACP and other sources recommended by the NAACP when there are job openings, operating a minority internship program and meeting annually with NAACP representatives with respect to the Stations' EEO program. (Id. at pp. 3-4, 16-23.)

P The Petition to Reex and Bilateral Investigation